

**REMARKS**

In response to the Office Action mailed May 7, 1992, the applicants request reconsideration in view of the amendment and the following remarks. Applicants wish to thank the Examiner for the courtesy of the interview granted by the Examiner on August 18, 1992. A draft of the above amended claims was discussed with the Examiner. The Examiner requested certain changes to the proposed claims, and requested that claim 1 be amended to conform with the limitations of Formula II in claim 9. All of the requested changes are incorporated within this Amendment, and as so amended, the Examiner agreed that the claims were allowable. The amendments above, in conjunction with the terminal disclaimer which has been filed, should place the application in condition for allowance.

**A. SUMMARY**

In the Office Action, the Examiner rejected claims 9, 11-14, 18-20, 24, 32-34 and 38-41 under §112. The specific objections by the Examiner were that the rejected claims included directly or dependently a limitation to a "hydroxy" substituent which the Examiner believes is not enabled, or referred to "aryl" substituents without limiting the "aryl" to specific rings. In view of the amendments above in conjunction with the arguments set forth below, these rejections have been obviated.

The Examiner has rejected claims 8-23 and 32-41 under the judicially created doctrine of obviousness-type double patenting. Applicants continue to traverse the double-patenting rejection for reasons set forth below. However, because the time dedicated is relatively short and to expedite the prosecution, applicants have filed a terminal disclaimer as proposed in the Office Action to obviate the double-patenting rejection.

Claims 1, 8 and 9 were rejected on grounds of anticipation or, in the alternative, obviousness over Shepard '506. During the interview, it became apparent that the Examiner's rejection of claim 1 in view of Shepard '506 was an inadvertent error, which arose because the PTO had not picked up all the brackets in applicant's prior Amendment showing the deletion of all the subject matter formulas of claim 1, except for Formula II. Thus, the Examiner had not been aware that claim 1 had been amended previously to be limited to Formula II compounds. In the prior Office Action, the Examiner had rejected claim 1 solely because of the inclusion of compounds of other formulas which had been deleted, and the Examiner had not previously questioned the patentability of the Formula II compounds on grounds of any prior art. In any event, for reasons set forth below, any rejection under §102 or §103 as to the amended claim 1, which is limited to Formula II compounds, should be withdrawn. Claims 8 and 9, which were also rejected on the basis of Baranauckas and Spivack, respectively, have been amended to include the limitations of claims 10 and 11, which have not been rejected on grounds of prior art. (Claim 10 was rejected solely for double patenting which is obviated by the terminal

disclaimer; and claim 11 was rejected solely for double-patenting and under §112 and those rejections have been obviated by the terminal disclaimer and the above amendments).

#### **B. DETAILED ANALYSES OF THE AMENDMENTS**

Claim 1: Claim 1, which is limited to Formula II compounds, has been further amended to conform the language to that in claim 9, which the Examiner stated would place the claim in condition for allowance. It was agreed that "benzyl" should not be in the Markush groups in this or other claims, because "benzyl" is within the term "aralkyl" and its listing would present a case of double inclusion.

Claims 5 and 7: The Examiner has objected to claims 5 and 7 as "being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim". (Office Action page 6). Although this was not discussed in the interview, now that claim 1 has been indicated to be allowable, the objection is moot, and claims 5 and 7, which are properly dependent to the amended claim 1, should be allowable.

Claims 8 and 10: Claim 8 has been amended to incorporate the limitations of dependent claim 10, and amended claim 8 is now the same as claim 10 in independent form. Claim 10 had been rejected solely on grounds of double patenting, which rejection is obviated by the terminal disclaimer. With the amendment, the Examiner indicated claim 8 was in condition for allowance. Claim 10 has been cancelled.

Claim 9: Claim 9 had been rejected under §112, in view of the prior art, and for double patenting. Claim 9 has been amended to overcome the §112 rejections. The terms "hydroxy" have been stricken, and the "aryl" have been defined as described in the specification. Where "R" (or R<sup>1</sup> or R<sup>2</sup>) have been previously defined as a "substituted or unsubstituted aryl", they are now defined as a "substituted or unsubstituted phenyl". Support for "phenyl" is found throughout the specification as "R" is found in all examples as a phenyl or substituted phenyl. In the definition of substituents, "aryl" has been defined by the Markush group indicated, which are substituents specifically identified as set forth at, for example, Col. 2, lines 23-25 of the specification. It was agreed that "benzyl" should not be in the Markush groups in this or other claims, because "benzyl" is within the term "aralkyl" and its listing would present a case of double inclusion. Since claim 9 is dependent from allowable amended claim 8 (prior claim 10), and in view of the terminal disclaimer, the Examiner indicated that the amended claim 9 will be in condition for allowance.

Claim 44: In view of the amendments to claims 8 and 9, new claim 44 now restates what had been the "Formula II" portion of original claim 9. The Examiner had not previously rejected or objected to a claim covering the "Formula II" scope of original claim 9, and has not rejected claim 19 on prior art grounds. Claim 44 is essentially of the same scope as was original claim 19, and is of the same scope as the "Formula II" portion of original claim 9. Because claim 19 is dependent on claim 9, which has been limited to a certain class of organic materials,

claim 44 is required to properly protect applicants' invention. As discussed during the interview, the Examiner has stated that claim 1 was inadvertently rejected because all the brackets in applicants' prior amendment had not been apparent. Claim 1, as limited to Formula II and amended to include the "aryl" Markush group was indicated to be allowable. Hence, the combination of claim 1 compounds with organic materials (which was the "Formula II" portion of original claim 9) is allowable, and the Examiner indicated that with the amendment to claim 1, claim 44 will be allowed.

Claim 11: Claim 11 has been amended to depend from claim 44 and, again, reflects the original claim 11 as applied to the "Formula II" portion of original claim 9.

Claim 12: Claim 12 has been amended to depend directly from claim 9, and has been limited to a substituted "R" phenyl group.

Claims 13 and 14: Claims 13 and 14 have been amended to obviate the §112 objections. Further, the "alkoxycarbonyl" substituents have been deleted to further differentiate the claim from the previously-cited Spivak '855 reference.

Claims 17, 19 and 24: These claims have been amended to obviate the §112 objections.

**C. REJECTIONS UNDER §112**

In the Office Action, the Examiner has rejected claims 9, 11-14, 18-20, 24, 32-34 and 38-41 under 35 U.S.C. §112, first and second paragraphs. The Examiner stated essentially that: (1) there is no enablement for the "hydroxy" (OH) substituent on the aryl group; and (2) "Aryl" is not sufficiently defined, and, if given a broad reading, is not-enabled because applicant has not shown starting materials that would enable, e.g., antracene, perylene or benzopyrene. The Examiner confirmed during the interview that there would be no objection to the claims if the term "hydroxy" was stricken and "aryl" was more narrowly defined. During the interview, the Examiner also orally entered the same rejections with respect to claim 1.

Given that this is a reissue application and that the claims are under final rejection, applicants have acceded to the Examiner's objection with respect to the rejected claims in order to expedite the prosecution. Although the point is moot in view of the Amendment, applicants set forth below their reasons for traversing the rejection.

**1. Hydroxyl Substituent**

The Examiner stated that applicants have not enabled a skilled artisan to make the recited compounds containing a hydroxy substituent on the substituted aryl group.

However, as applicants pointed out at pp. 18-19 of the prior Amendment, one skilled in any chemical art would be bound to know that one could not cause all of the OH groups of an

aryl to react with  $\text{PCl}_3$ , unless one used enough  $\text{PCl}_3$  to react all the OH groups. Thus, one skilled in the art would certainly know that one way of making sure that one's product would contain OH after reaction with  $\text{PCl}_3$  would be to use insufficient  $\text{PCl}_3$  to react all the OH groups of the starting material.

This is also set forth at Col. 15, line 54-58 of the specification, where it is stated that:

The amount of  $\text{PCl}_3$  ... used to form the intermediate chloro...-phosphite depends on the number of hydroxyl groups in the phenolic reactant and the average number of residual P-Cl...groups desired in the intermediate.

The specification at Col. 15, lines 40-45 (Formula IV) schematically discloses how an aryl group substituted with two hydroxys can be reacted with R- $\text{PCl}_2$ , followed by a reaction with KF, to form a hydroxy-substituted compound.

The statute, 35 U.S.C. §112, does not require a working example of each and every embodiment within the scope of a claim. As stated in In Re Marzocchi, 169 USPQ 367, 369-70 (CCPA 1971):

[I]t is incumbent upon the [PTO], whenever a rejection on this basis is made, to explain why it doubts the truth or accuracy of any statement in a supporting disclosure and to back up assertions of its own with acceptable evidence or reasoning which is inconsistent with the contested statement.

Applicants believe that the process descriptions set forth in the specifications are sufficient for an ordinarily skilled chemist to make a hydroxy-substituted compound.

2. "Aryl" Groups

In the Office Action, the Examiner had restated reasons 7, 8, 10 and 11 from the first Office Action, while for the first time applying some of the rejections to claim 9. However, as addressed at pp. 20-22 of applicant's prior amendment, the inclusion of "aryl" per se in the claims is not violative of §112.

The Examiner asks whether "aryl" in the claims embraces anthracene, perylene and benzopyrene, and then questions why sources of such groups are not provided. However, there is no requirement that the source of every aryl substituent be specifically set forth in the specification. These groups are typical fused-ring aromatics, and they behave chemically like aromatic compounds. Having generally disclosed the use of aryl and enabled several aromatic groups in the specification is all that is required to support "aryl" in the claims, absent any evidence that compounds having such groups can not be made by a person of ordinary skill in the art. It is noted that one of the references relied upon by the Examiner, Baranauckas '050 utilizes the phrase "aromatic" and "aryl", although only phenolic starting reactants are disclosed.

The mere fact that an applicant specifically enables only one compound or a narrow class, while the specifications generically disclose and the claims cover a wide class of chemical entities, is not grounds for a §112 rejection for lack of enablement or lack of specificity. Enablement does not require a specific example for every covered compound. In In Re Bowen, 181 USPQ 48 (CCPA 1974), the applicant specifically described only one polymer, but the

claims were directed to "melt-polymerizable material". The CCPA reversed the Board's §112 (¶¶ 1 and 2) rejection of the claims, holding:

[T]here appears to be no basis for the non-enablement rejection of the theory that claims read on undisclosed polymers. While the claims literally comprehend numerous polymers in addition to the one specifically described in appellant's specification, nylon 66, no persuasive reason has been given by the Patent Office why the specification does not realistically enable one skilled in the art to practice the invention as broadly as it is claimed.

The above principle was more recently summarized by the Federal Circuit in U.S. v. Telectronics, Inc., 8 USPQ2d 1217, 1224 (Fed. Cir. 1988), as follows:

Yet, in *Bowen* the board's non-enablement rejection was reversed where the "claims" literally comprehend numerous polymers in addition to the one specifically described in appellant's specification" because no persuasive reason was given by the Patent Office why the specification does not realistically enable one skilled in the art to practice the invention as broadly as it is claimed.

There is also no need to specifically enable or identify the starting materials or "sources" for all parts of a claimed composition. In In Re Brebner, 173 USPQ 169, 171 (CCPA 1972), it was stated:

But a rejection for failure to enable because of failure to disclose how to obtain starting materials would be sustainable only if the method of obtaining them would not be apparent to one of ordinary skill in the art.

See, also, In Re Barrett, 169 USPQ 560 (CCPA 1971) ("an anion permeable membrane" was proper even though selection criteria for it were not explained in the specification because "the selection of an appropriate membrane would have been within the ordinary skill in the art").

A patent applicant is entitled to claim his invention generically, if it is described sufficiently to meet the requirements of §112, "without describing all species that claim encompasses". Utter v. Hiraga, 845 F.2d 993, 998, 6 USPQ2d 1709, 1714 (Fed. Cir. 1988).

In In Re Marzocchi, 169 USPQ 367, 369 (CCPA 1971), the Examiner and Board objected to the term "polyethyleneamine" in the claims for lack of enablement, because there was no proof all the compounds within the generic definition would work. The CCPA reversed, holding:

[T]hese comments indicate nothing more than a concern over the breadth of the disputed term. If we are correct, then the relevance of this concern escapes us.

The cases cited by the Examiner, In Re Howarth, 210 USPQ 689 (CCPA 1981) and Ex Parte Moersch, 104 USPQ 122 (Bd. of App. 1954) are not in point. There, it was impossible to practice the invention at all because the necessary starting materials were not enabled. Those cases do not contradict the cases cited above which provide that the applicant does not have to specifically enable every possible compound falling within the scope of the claim.

Given that aryl compounds and their chemistry are well-known and are recognized to have the same chemical reactivities (at least in terms of the type of synthesis involved in the

instant application), it is not understood why the person of ordinary skill in the art, could not synthesize the other aryl compounds following the same processes as disclosed in the application for the phenyl aryl compounds.

#### D. PRIOR ART REJECTIONS

##### 1. SHEPARD '506

The Examiner had rejected claims 1, 8 and 9 in the Office Action as anticipated or, in the alternative, obvious over Shepard '506.

###### -- Claim 1

In the Office Action, the Examiner had rejected claim 1 solely on the basis of Shepard '506. This rejection had been discussed earlier, and has been withdrawn at the interview.

Applicants note that the Examiner stated that "Compositions with formula VI are contemplated by Shepard" (Office Action page 3). However, applicants have previously amended claim 1 to delete Formula VI. Only Formula II remains in claim 1. In the first Office Action, the Examiner cited Shepard '506 only in connection with Formula V of claim 1, and never applied any prior art to the Formula II compounds. Shepard '506 neither discloses nor renders obvious Formula II. Shepard '506 does not disclose in any way any compounds which contain a bridging moiety between the two hydroxy phenyl groups (i.e., a compound where the Y and Y' in Shepard's compound are bridged), and the Examiner has not cited anything (and

there is nothing) in Shepard '506 which would motivate a skilled artisan to make the Formula II compounds. An anticipation or obviousness rejection can not be maintained when the reference does not contain any disclosure of Formula II compound or any teaching motivating a person skilled in the art to make a Formula II compound. In Re Jones, 21 USPQ2d 1941 (Fed. Cir. 1992).

Applicants further refer to the discussion of Shepard '506 in connection with claim 8 and 9, below.

--Claims 8 and 9

With respect to claims 8 and 9, the claims have been amended to include the limitations of claim 10 which was not rejected on prior art grounds but only for double patenting. Claims 8 and 9 are thus allowable.

The Examiner stated in the Office Action that "Shepard does teach antioxidant and other uses in lube oil, clearly an organic compositions" (Office Action page 3). That is not controverted, but the question is what compounds does Shepard teach for that use. Shepard teaches phosphorohalidites only as intermediates for the making of other types of antioxidants, and not as antioxidants themselves. The Examiner appears to agree that if Shepard '506 taught the use of phosphorohalidites only as intermediates, that the §102 and §103 rejections would not be maintained. In Re Lalu, 747 F.2d 703, 223 USPQ 1257 (Fed. Cir. 1984).

Applicants recognize the simplicity of the Examiner's position in the Office Action. Shepard '506 in Col. 1 lines 16-24 discloses a generic formula where R may be a "halogen radical" and Shepard refers to this formula as "secondary aryl phosphites of this invention" (Col. 1 lines 14-15). Shepard then states that "The secondary aryl phosphites of this invention may be used as antioxidants" (Col. 1 lines 30-32). That is the only alleged statement in the entirety of the reference which could even be argued as suggesting the use of phosphoro-halidites as antioxidants.

Applicants respectfully submit, however, that, when the entire Shepard reference is reviewed as a whole, it is clear that the above statement of utility refers only to Shepard's secondary aryl phosphites, not his phosphorohalidites.

Like amines, which are properly called secondary amines only when the trivalent nitrogen atom still has an unreacted -H attached thereto, phosphites are properly called secondary phosphites only when the trivalent phosphorus still has an unreacted -OH attached thereto. In one section, the generic formula at Col. 1 lines 14-29, Shepard incorrectly uses the expression "secondary aryl phosphite" to cover both secondary phosphites and halophosphites. However, the patent as a whole indicates that this one misuse of the expression is attributable to careless editing of Shepard's application before it was filed rather than to any intent on the part of Shepard to use the expression in an unconventional way.

That Shepard, in fact, distinguished between the true secondary aryl phosphites and phosphorohalidites is demonstrated by the remainder of the reference:

1. At Col. 1 lines 60-62: Shepard states that in using his process, "a secondary aryl phosphoro-halidite is obtained which is then hydrolyzed to a stable secondary aryl phosphite". Thus, Shepard distinguished between a "phosphoro-halidite" and a "secondary aryl phosphite".

2. At Col. 4 lines 30-33: Shepard states that

In the process as described herein, phosphorochloridites are formed. Some cannot be readily hydrolyzed to their corresponding secondary phosphites and are recovered as such.

Again, Shepard had distinguished between phosphorohalidites and "secondary phosphites".

3. At Col. 4 lines 66-67: Shepard states that "Note should be made of the fact that the phosphorochloridites are very stable intermediates".

4. Claim 6: Shepard states a process claim "to produce a phosphorohalidite, and hydrolyzing the phosphorohalidite to a corresponding aryl phosphite".

5. Claim 10: Most importantly, in claim 10, Shepard describes a process of making a compound wherein "R" in the generic formula in Col. 1 is a halogen. Shepard states that the process produces a "phosphorohalidite", and does not call it a secondary aryl phosphite.

It is thus believed apparent that Shepard did not suggest any utility for phosphorohalidites other than as intermediates for preparing the secondary aryl phosphites which can be used as antioxidants, etc. Such teachings could not possibly lead to the discovery that any phosphorohal-

idites could be used as antioxidants, and certainly could not suggest that fluorophosphites which might be prepared by using  $\text{PF}_3$  instead of  $\text{PCl}_3$  in Shepard's process (if the  $\text{PF}_3$  would actually react) would be greatly superior to their chlorophosphite analogs as antioxidants.

At most, given that there is absolutely no specific teaching of phosphorohalidites as antioxidants, there is a gross ambiguity in the Shepard reference as to what was encompassed by the term "secondary aryl phosphites of this invention may be used as antioxidants...." It would seem clear from Shepard's teaching that the phosphorochloridites were hydrolyzable to secondary aryl phosphites, producing necessarily  $\text{HCl}$ , that these would not be viewed as useful in the cited utilities per se, but would be viewed solely as novel intermediates. Shepard's Table 1 and footnote 1 clearly teaches that the phosphorochloridites rapidly hydrolyze and form  $\text{HCl}$  in the presence of water, and Shepard specifically teaches that his phosphorohalidites are hydrolyzable to stable "secondary aryl phosphites". It presumes stupidity in the art, rather than ordinary skill in the art, to expect in such circumstances that a skilled artisan would read the aforementioned statement of utility to refer to phosphorohalidites of Shepard's invention, rather than solely to the true secondary aryl phosphites.

In view of the above, Shepard '506 can not be viewed as anticipating or rendering obvious the present invention of fluorophosphorus aryl compounds in organic materials.

2. BARANAUCKAS '050

In the Office Action, the Examiner had rejected claim 8 under 35 U.S.C. §102 (b and g) as anticipated by or, in the alternative, under 35 U.S.C. §103 as obvious over Baranauckas '050.

Claim 8 has been amended to include the limitations of claim 10. Claim 10 was properly not rejected on the basis of prior art in the prior Office Actions, and the present claim 8, which is restatement of the original claim 10 in independent form, is patentable.

The single phrase in Baranauckas '050 that "the chlorine may be substituted by another halogen" (Col. 1 lines 38-39) does not anticipate or render obvious any fluorophosphorus compound. In any event, Baranauckas '050 discloses only a very narrow group of compounds which are not within the scope of any of the Formulas in the amended claims. Further, Baranauckas says broadly that his inventive compositions "are not only useful as flame retardants, or heat stabilizers, but are also useful as intermediates for the production of further useful compositions" (Col. 2, lines 8-12). It would be to build fiction upon fiction to suggest that Baranauckas necessarily discloses fluorophosphorus compounds (although fluorine is never mentioned), and then further assert that the never-disclosed fluorophosphorus materials are anticipated as antioxidants for use with polymers of olefinically unsaturated monomers.

3. SPIVACK

In the Office Action, the Examiner had rejected claim 8 on the basis of Spivack '207.

Claim 8 has been amended to include the limitations of claim 10. Claim 10 was properly not rejected on the basis of prior art in the prior Office Actions, and the present claim 8, which is restatement of the original claim 10 in independent form, is patentable.

Much of the same arguments apply to Spivack as Baranauckas '207. Spivack '207 teaches only compounds that might fall within the Formula III compositions of the invention, even were the fiction accepted that Spivack's use of "halogen" anticipates fluorophosphorus compounds. However, fluorophosphorus compounds are not anticipated or rendered obvious by the reference. It would also build fiction upon fiction to suggest that the never-expressly disclosed fluorophosphorus compounds are anticipated for use as antioxidants with polymers of olefinically unsaturated monomers.

E. DOUBLE PATENTING

The rejection of claims 8-23 and 32-41 under the judicially-created doctrine of obviousness-type double patenting as unpatentable over claims 1-14 of U.S. Patent 4,867,907 (Burton et al.) is traversed for the reasons of record and the following reasons:

(A) Contrary to the Examiner's belief, the patented compositions of Burton et al. are not closer than applicant's claim 1 compounds to the compositions of the rejected claims.

Phosphite antioxidants are typically incorporated into the material to be stabilized by the use of organic solvent solutions (as in column 20, lines 3-7, of the present application and column 19, Example 33, of Spivack '207) or by dissolving the straight phosphite in the material to be stabilized (as in columns 3-4, Example 2, of Baranauckas et al.) rather than by the use of aqueous suspensions.

(B) Nothing in applicant's teachings regarding mixing or spraying "with a solution of the additive in a volatile solvent" (column 14, lines 55-60), and nothing in the Burton et al. teachings regarding the utility of water in preparing suspensions suitable for utilization in the spin finishing of polyamide filaments could suggest substituting water for applicant's volatile solvent as "the cheapest volatile solvent and the only one not requiring solvent recovery". As indicated by the fact that Burton et al. have to emulsify or disperse their aryl fluorophosphites in water, water is not a solvent for the fluorophosphites.

(C) Its having been possible to claim the inventions of different inventive entities in a single application since 1984 does nothing to change the basic ruling of the CAFC in In re Bratt (19 USPQ2d 1289 at 1293) that:

"...only if the extension of patent right is *unjustified* is a double patenting rejection appropriate. There are situations where the extension is justified. See *Borah; In re Kaplan*, F.2d 1574, 1577-78, 229 USPQ 678, 681-82 (Fed. Cir. 1986). This case presents such a situation.

After all, there is nothing in the CAFC ruling to support (1) the belief that "situations where the extension is justified occur only in mechanical cases, not in chemical cases, or (2) the supposition that the extension could be justified only in applications filed before Public Law 98-627 made it possible to claim the inventions of different inventive entities in the same application.

Actually, the existence of Public Law 98-627 has no relevance to the present situation. Diversity of inventorship was not the reason for the separate filings of (1) the application that resulted in the patent which applicant now seeks to have reissued and (2) the application that resulted in Burton et al. There was no way that the Burton et al. invention could have been combined with applicant's invention in the application which he filed February 27, 2987. The Burton et al. invention was not even made until after that date.

It is accordingly believed that the double patenting rejection is not sustainable.

However, given that the time dedicated by the terminal disclaimer would be only 189 days and in order to expedite the prosecution, applicants have filed a terminal disclaimer to obviate the Examiner's rejection.

**F. CLAIMS 15 AND 16**

At p. 2 of the Office Action, the Examiner stated that "claims 15, 16 appear duplicates".

They are not.

Claim 15 is limited to bis (2, 6-di-tert-butylphenyl) fluorophosphite which has the t-butyl substituents in the 2- and 6- positions. Claim 16 is limited to bis (2, 4-di-tert-butylphenyl) fluorophosphite which has the t-butyl substituents in the 2- and 4- positions. The two compounds are not the same.

**G. CLAIM 43**

The Examiner has objected to claim 43 "as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form...." (Office Action page 6). In fact, claim 43 is already written in independent form. The claim has now been indicated as allowable.

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As a precautionary matter, applicants hereby submit a supplemental oath by the inventor.

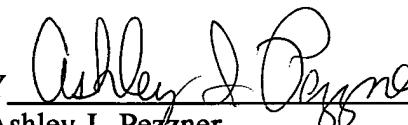
A one month extension fee has been paid.

If there are any additional fees due in connection with the filing of this response, including any fees required for an additional extension of time under 37 C.F.R. §1.136, such an extension is requested and the Commissioner is authorized to charge or credit any overpayment to Deposit Account No. 03-2775.

For the reasons set forth above, and in view of the Examiner's statement at the interview that the claims as amended would be allowed, Applicants believe that the claims are patentable over the references cited and applied by the Examiner and a prompt and favorable action is solicited.

Respectfully submitted,

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DATED: August 20, 1992

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